

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ENRIQUETA B. AGCAOILI,) DOCKET NUMBER
Appellant,) NY07528910362
v.)
VETERANS ADMINISTRATION,) DATE: JUN 11 1991
Agency.)
)

Norma Ramos, Esquire, Elmhurst, New York, for the
appellant.

Steven Kraut, Esquire, New York, New York, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the June 14, 1989, initial decision dismissing her appeal for lack of jurisdiction. The Board DENIES the petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS the case on its own motion under 5 C.F.R. § 1201.117, however, VACATES the initial decision, and REMANDS this appeal for adjudication.

BACKGROUND

The appellant filed a petition for appeal challenging her April 28, 1989, removal from a GS-5 Licensed Practical Nurse position with the Veterans Administration Hospital in New York City. She was appointed to the position on July 19, 1987, as a nonpreference eligible temporary employee in the excepted service under 38 U.S.C. § 4114. Her appointment subsequently was converted to a permanent excepted appointment pursuant to 38 U.S.C. § 4104(3)¹.

The administrative judge dismissed the appeal for lack of jurisdiction finding that, as a nonpreference eligible employee in the excepted service, the appellant did not have appeal rights to the Board. The administrative judge, relying on *Godfrey v. Veterans Administration*, 40 M.S.P.R. 438 (1989),² rejected the agency's claim that the Board had jurisdiction under 38 U.S.C. § 4106(g).

¹ 38 U.S.C. § 4104(3) empowers the Administrator of the Veterans Administration to appoint clinical or counseling psychologists, certified or registered respiratory therapists, licensed physical therapists, licensed practical or vocational nurses, pharmacists, and occupational therapists.

² The Board noted in footnote 2 in *Godfrey* that the Office of Personnel Management revised its regulations, effective July 11, 1988, to extend coverage under chapter 75 of title 5, United States Code, to individuals employed under 38 U.S.C. § 4104(3). This was done pursuant to statutory changes in the Veterans' Benefit and Services Act of 1988, Pub. L. No. 100-322. The expanded appeal rights provided by the new statute did not apply to *Godfrey* since the adverse action in that case arose prior to the enactment of the statute and there was no provision for retroactive application.

Analysis

Contrary to the finding of the administrative judge, the Board has jurisdiction over this appeal and the appellant is entitled to adjudication of the merits of her case.

The appeal rights of individuals appointed under 38 U.S.C. § 4104(3) were changed by the Veterans' Benefit and Service Act of 1988 (Pub. L. No. 100-322). Prior to that Act, such employees had no appeal rights to the Board for adverse actions. That Act provides, as codified at 38 U.S.C. § 4106(g)(3), that individuals appointed under 38 U.S.C. § 4104(3) are entitled to appeal adverse actions as though they had been appointed under title 5.³ Similarly, 5 C.F.R. § 752.401(c)(8) (1989) provides that licensed practical nurses employed under 38 U.S.C. § 4104(3) are entitled to appeal adverse actions to the Board.

The appellant was appointed under 38 U.S.C. § 4104(3), and, therefore, is entitled to appeal her removal to the Board. Thus, we remand this case to the New York Regional

³ 38 U.S.C. § 4106(g)(3) states that "[n]otwithstanding any other provision of this title or other law, all matters relating to adverse actions, disciplinary actions, and grievance procedures involving individuals appointed to such positions (including similar actions and procedures involving an employee in a probationary status) shall be resolved under the provisions of title 5 as though such individuals had been appointed under such title." The individuals governed by this provision include individuals appointed under 38 U.S.C. § 4104(3).

Office for adjudication of the merits of the removal appeal.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.